

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant's accidental injury compensable and awarded claimant permanent partial disability benefits based upon a thirty-two percent (32%) work disability. The respondent and insurance carrier requested this review and raise the following issues:

- (1) Whether claimant's car accident on February 4, 1988, which occurred while claimant was returning home from medical treatment of an earlier work-related injury, arose out of and in the course of his employment with the respondent; and
- (2) If the accidental injury is compensable, what is the nature and extent of injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

- (1) In July 1987 claimant sustained an injury compensable under the Workers Compensation Act. During early 1988, claimant was still receiving medical treatment for that injury, and on February 4, 1988, claimant was involved in an automobile accident when he was returning home from a doctor's appointment.

The Appeals Board finds the February 4, 1988, accident arose out of and in the course of claimant's employment with the respondent. This issue was decided in the case of Taylor v. Centex Construction Co., 191 Kan. 130, 379 P.2d 217 (1963) which held that an accidental injury was compensable under the Workers Compensation Act when it occurred during travel to secure medical treatment for a work-related injury. The Kansas Supreme Court reasoned that an employer is under a statutory duty to furnish medical care and an employee is similarly under a duty to submit to reasonable medical treatment under the Act. Because the provisions of the Workers Compensation Act, by implication, become part of the employment contract, the Court held that accidental injuries occurring during a trip for medical treatment are work connected and, therefore, compensable. At page 136, the Court said,

"It would be folly to say that the claimant's trip going to and from the doctor's office did not '**arise out of**' the nature, conditions, obligations, or incidents of his employment. (Pinkston v. Rice Motor Co., 180 Kan. 295, 303 P.2d 197.) In Larson's Workmen's Compensation Law, Vol. 1, p. 186, it is said:

"It should not, therefore, be necessarily concluded that anything happening to an injured workman in the course of a visit to the doctor is compensable. To get this result, there should be either a showing that the trip was in the course of employment by usual tests, or that

the nature of the primary injury contributed to the subsequent injury in some way. . . .”

“There can be no question but that securing medical treatment in Topeka was **in the course of** claimant's employment and we have no hesitancy in holding that the district court erred in finding that the trip to the doctor's office was not a part of claimant's employment.” (Emphasis added.)

In any employment to which workers compensation laws apply, an employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment. K.S.A. 1987 Supp. 44-501(a). The two phrases “arising out of” and “in the course of” employment, as used in our Workers Compensation Act, have separate and distinct meanings. The phrases are conjunctive and each condition must exist before compensation is allowable.

The phrase “arising out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury “arises out of” employment when there is a causal connection, apparent to the rational mind, between the conditions under which the work is required to be performed and the resulting injury. An injury “arises out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. Before an injury can be said to “arise out of” the employment, the risk must be incidental to the work. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 198, 689 P.2d 837 (1984). The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service. Kindel v Ferco Rental, Inc., 1995 WL 458961; Hormann v. New Hampshire Ins. Co., *supra* 198-99; Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

Respondent argues that claimant's accident is not compensable under the Workers Compensation Act because it occurred during claimant's travel home after his medical appointment. The Appeals Board disagrees. Respondent's contention is not persuasive. Under respondent's theory, an accident would be compensable only if an employee was injured on the way from work to receive medical treatment or on the way to work after receiving medical treatment, but never on a trip to or from home. The better logic is that if a journey is covered at all, the entire journey is covered. Trips to and from medical appointments should be treated similarly to required business travel. Following the precedent of Taylor, *supra*, the Appeals Board finds claimant's accident of February 4, 1988, arose out of and in the course of his employment with the respondent.

(2) The Appeals Board agrees with the finding of the Administrative Law Judge regarding the nature and extent of claimant's injuries and the finding of a thirty-two percent (32%) work disability.

Several doctors testified regarding the injuries sustained by claimant as a result of the February 1988 car accident. The Administrative Law Judge was persuaded by the testimony of orthopedic surgeon Theodore Sandow, M.D., who was appointed to perform an independent medical examination. The Appeals Board is likewise persuaded by Dr. Sandow's testimony and finds that claimant has sustained a twelve percent (12%)

permanent functional impairment to the body as a whole as a result of the injuries he received to his left upper extremity and left shoulder in the automobile accident.

Because he has sustained a "non-scheduled injury", claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1987 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board finds that, based upon the testimony of labor market experts Donald E. Vander Vegt and Michael Dreiling, claimant has sustained a loss of ability to perform work in the open labor market in the range of twenty-eight to forty-three percent (28-43%). Based upon this range, the Appeals Board finds claimant's loss of ability to perform work in the open labor market is thirty-five and one-half percent (35.5%). Based upon claimant's recent employment with a dry cleaners, the Appeals Board finds claimant retains the ability to earn approximately \$7.50 per hour, or \$300.00 per week, and, therefore, has sustained a twenty-eight and one-half percent (28.5%) loss of ability to earn comparable wages. This percentage of loss of wage-earning ability is derived by comparing \$300.00 per week to the stipulated average weekly wage of \$419.25.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and, accordingly, they will be weighed equally. The result is an average between the thirty-five and one-half percent (35.5%) loss of access and the twenty-eight and one-half percent (28.5%) loss of ability to earn a comparable wage resulting in a thirty-two percent (32%) work disability which the Appeals Board considers to be an appropriate basis for the Award in this case.

(3) The Appeals Board adopts the findings and conclusions of the Administrative Law Judge that are not inconsistent with those specifically set forth above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard entered in this proceeding on January 11, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph R. Ebbert, Kansas City, Kansas
Mark E. Kolich, Kansas City, Kansas
M. Bradley Watson, Prairie Village, Kansas
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director